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The Effect of Brexit on Workers' Rights

Michael Ford QC*

I. INTRODUCTION

This article is being written against a background of great legal uncertainty and political volatility. We have just learned from the Prime Minister, Theresa May, that the UK Government will invoke Article 50 of the Treaty of European Union (TEU) before March 2017 and will introduce a Bill in the next Queen's speech - the 'Great Repeal Bill' (GRB) - repealing the European Communities Act 1972 (ECA) with effect from the date on which Brexit occurs.¹ While the jurisdiction of the Court of Justice (ECJ) will end, according to Mrs May the existing *aquis* of EU law will be converted into UK law - though it is unclear precisely which provisions are embraced within that term - to be repealed, revoked or amended at leisure in later years. Turning her back on years of Conservative hostility to EU-guaranteed employment rights, the Prime Minister emphasised that 'existing workers' legal rights will continue to be guaranteed in law' so long as she held that office. For good measure she added that as a result of the review announced the day before, to be conducted by Matthew Taylor, these rights would be 'enhanced' by the Conservative Party, now magically transformed into 'the true workers' party'.²

As I write, no draft GRB has yet been published, there is little outline of the envisaged trading agreement with the EU, details of the Government's proposals are scant and opaque, and litigation has commenced on the process for triggering Article 50. As a result this article contains a good deal of speculation. What we do know, as I explained in detail in an advice written for the TUC prior to the referendum,³ is that most employment rights in the UK are at present guaranteed by EU law. The rights include protection against discrimination in the work sphere; the principal health and safety regulations; rights to collective information and consultation on redundancies, transfers and beyond; working time rights; protections of workers on transfers of undertakings and in insolvency; rules on the treatment of fixed-term,

* Professor of Law, University of Bristol and Barrister, Old Square Chambers. Thanks are due to comments on an earlier draft from Keith Ewing, Tonia Novitz, and Phil Syrpis [INSERT OTHERS]. The usual blame for errors applies. E-mail: Michael.Ford@bristol.ac.uk.

¹ Transcript available at <www.independent.co.uk/news/uk/politics/theresa-may-conference-speech-article-50-brexiteu-a7341926.html> accessed 2 October 2016.

² *Ibid.* For outline of the review, see the article by M. Taylor in *The Guardian*, 1 October 2016, <www.theguardian.com/commentisfree/2016/oct/01/i-tell-theresa-may-working-lives-review-modern-employment-zero-hours-flexibility> accessed 5 October 2016.

³ M.Ford, *Workers' Rights from Europe: The Impact of Brexit* (March 2016), available at <www.tuc.org.uk/international-issues/europe/eu-referendum/workplace-issues/brexit-could-risk-%E2%80%99Clegal-and-commercial> accessed 26 September 2016.

agency and part-time workers; and other, more peripheral, rights such as data protection. The principal purely domestic exceptions are the individual rights not to be unfairly dismissed, to the national minimum wage and to redundancy payments, and the labyrinthine procedure for compulsory trade union recognition.

During the debates about Brexit prior to the referendum, the main parties' views on workers' rights divided along traditional lines. For the Labour party, Jeremy Corbyn warned of a 'bonfire of rights' if the UK left the EU.⁴ This view was justified because the most prominent voices within the Conservative party were those of 'leavers', such as Boris Johnson, Michael Gove and Priti Patel, who saw ditching EU regulations, including employment regulations, as one of the major benefits of Brexit.⁵ While she was Minister for Employment, for example, Priti Patel went so far as to call for the UK to 'halve the burdens of EU social and employment legislation' after Brexit.⁶ These leavers drew on dubious evidence that, for example, the combined cost of the Working Time Directive and the Temporary Agency Work Directive was £6.3 billion each year.⁷

This binary political world is now dissolving after the referendum, as the Conservatives attempt to reposition themselves in light of the social fractures exposed by the vote. The first sign of the shift was a statement from, David Davis, the newly appointed Secretary of State for Exiting the EU and a prominent 'leaver', that employment regulations should not be repealed post-Brexit, making the aberrant claim (for a Conservative politician) that 'the empirical studies show that it is not employment regulation that stultifies economic growth, but all the other market-related regulations'.⁸ Later he told the Foreign Affairs Committee this was only his personal view⁹ and the Government Minister for Business, Energy and

⁴ Reported in e.g. *The Guardian*, 14 April 2016 (at <www.theguardian.com/politics/2016/apr/14/jeremy-corbyn-leaving-eu-would-lead-to-bonfire-of-rights> accessed 2 October 2016.

⁵ See e.g. the article in the *The Guardian*, 11 May 2016 (<www.theguardian.com/politics/2016/may/11/boris-johnson-launches-the-vote-leave-battlebus-in-cornwall> accessed 6 October 2016

⁶ Speech to the Institute of Directors reported in e.g. *The Belfast Telegraph*, 18 May 2016 (<www.belfasttelegraph.co.uk/business/news/brexit-would-boost-uk-economy-by-43bn-claims-patel-34723908.html> accessed 15 September 2016.

⁷ See e.g. Open Europe, *Top 100 EU Rules Cost Britain £33.3 bn*. The data were based on government impact assessments and are wholly unreliable as to the actual 'costs', even if these are defined as costs to business alone. <openeurope.org.uk/intelligence/britain-and-the-eu/top-100-eu-rules-cost-britain-33-3bn> accessed 15 September 2016.

⁸ D. Davis, 'Trade Deals. Tax Cuts. And Taking Time Before Triggering Article 50. A Brexit Economic Strategy for Britain', 14 July 2016 (<www.conservativehome.com/platform/2016/07/david-davis-trade-deals-tax-cuts-and-taking-time-before-triggering-article-50-a-brexit-economic-strategy-for-britain.html> accessed 30 August 2016.

⁹ Foreign Affairs Committee, Oral Evidence, 13 September 2016, questions 191-3; available at <data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/foreign-affairs-

Industrial Strategy, Margot James, declined to give any assurance in Parliament that current employment rights would be preserved post-Brexit.¹⁰ But this was only a temporary restoration of normal affairs. Trade unions, the TUC and others, such as Melanie Onn, the Labour MP who sponsored a Private Members' Bill on the subject,¹¹ ensured that the issue did not disappear from the public gaze, and may have influenced the Prime Minister in deciding to adopt Mr Davis' position as official policy. It was probably inevitable in any case that any repeal of workers' rights would need to be deferred until after Brexit, if only in the interests of legal certainty.¹² Mrs May made a virtue out of this necessity, the latest instalment in the history of a party in which pragmatism or opportunism has often triumphed over ideology.¹³

So we are entering uncharted political waters, another unexpected consequence of the peculiar post-referendum world. A Conservative party which has spent years resisting *diktats* from Brussels on employment law in accordance with a neo-liberal ideology of unregulated labour markets now apparently endorses the very same rights.¹⁴ Any unfinished business with workers' rights has been pushed back to the distant horizon of the post-Brexit and perhaps post-May world, where the discounted value of Ms May's personal assurance is anyone's guess.

There is a further factor, however, which I suspect is relevant to why the Prime Minister felt untroubled in giving her personal assurance and why it has so far not generated objections from within the Conservative party or from business: the means adopted in the UK to give effect to those rights. As a result of recent reforms, the practical impact of the legal rights guaranteed to workers by EU law (as well as by domestic law) has very significantly diminished. Two recent reforms in particular stand out, because they both centrally affected EU-derived rights conferred on workers.

committee/implications-of-leaving-the-eu-for-the-uks-role-in-the-world/oral/38141.html> accessed 14 September 2016.

¹⁰ House of Commons, *Hansard* 13 September 2016, available at <hansard.parliament.uk/commons/2016-09-13/debates/16091315000021/TopicalQuestions> accessed 15 September 2016.

¹¹ The Workers' Rights (Maintenance of EU Standards) Bill, available at <services.parliament.uk/bills/2016-17/workersrightsmaintenanceofeustandards.html >accessed 15 September 2016.

¹² This is because if the ECA were simply repealed without such a saving provision, all secondary legislation made under it would be revoked by implication (*Watson v Winch* [1916] 1 KB 688), generating enormous uncertainty about transitional effects: see ss.16 and 23 of the Interpretation Act 1978 and Ford (n 3) at paras 83-84.

¹³ A. Seddon, 'The Conservative Century' in A. Seddon and S. Balls (eds) *The Conservative Century* (Oxford UP, 1994).

¹⁴ For a fuller account of the history, see M. Ford 'The Impact of Brexit on UK Labour Law' *International Journal of Comparative Labour Law and Industrial Relations* (forthcoming).

The first relates to the means of enforcing health and safety regulations at work. Following legislation introduced by the previous Government in 2013, these are now the subject of only criminal sanctions.¹⁵ In a stroke, a rule that had stood for over 150 years - that a worker injured as a result of a breach of health and safety legislation could bring a civil claim for damages¹⁶ - was swept aside. The ostensible reason for this change, according to the coalition Government, was in order to address the unfairness of strict liability, that an employer could be liable for damages in civil proceedings even though it had taken all reasonable steps to prevent the injury.¹⁷ But the reform was not restricted to excluding civil liability for breach of those (very few) regulations which impose strict liability.¹⁸ Instead it embraced *all* health and safety regulations, including the many provisions which are qualified by standards such as reasonable practicability.¹⁹ The blanket rule, according to the Government, was applied because it was less complex to enact, and would be easier for employers to understand, so addressing perceptions of a 'compensation culture'.²⁰

These thin justifications give rise to the legitimate suspicion of a Government removing civil liability in order simply to reduce the perceived or actual cost of all health and safety regulations.²¹ The principal regulations governing workplace health and safety are now derived from EU law,²² so that the standards in the regulations themselves could not easily be watered down. While the EU law principle of effectiveness requires *some* adequate means of enforcing breach of such regulations, the Government presumably concluded that a system of criminal enforcement alone would just about pass muster, reinforced in its view by the Court of Appeal judgment in a similar context in *R (URTU) v Secretary of State for*

¹⁵ See s.69 of the Enterprise and Regulatory Reform Act 2013, amending s.47 of the Health and Safety at Work etc. Act 1974.

¹⁶ See *Couch v Steel* (1852) 3 E & V 402 and the chapter by M. Loban, especially 1002-1012, in W. Cornish, S. Anderson, R. Cocks, M. Lobban, P. Polden and K. Smith, *The Oxford History of the Laws of England, Volume X11, 1820-1914* (Oxford UP 2010)

¹⁷ *The Government Response to the Löfstedt Report* (November 2011) 13-14 <www.gov.uk/government/uploads/system/uploads/attachment_data/file/66794/lofstedt-report-response.pdf> accessed 15 September 2016.

¹⁸ An example is regulation 5 of the Provision and Use of Equipment Regulations 1998, SI 1998/2306.

¹⁹ Such as many of those giving effect to EU Directives: see e.g. the Manual Handling Regulations 1992, SI 1992/2793.

²⁰ BIS, *Strict Liability in Health and Safety at Work Legislation* (11 June 2012) at 8 <www.gov.uk/government/uploads/system/uploads/attachment_data/file/34655/12-1219-strict-liability-health-safety-at-work-impact.pdf> accessed 15 September 2016.

²¹ See *Government Response* (n 17), 15.

²² In particular, the so-called 'six pack': see J. Clarke, *Redgrave's Health and Safety* (LexisNexis 2016).

Transport.²³ After the changes, the common law of negligence remains as a supplement to the criminal law in addressing some failings in health and safety; but it is based on a different and lower standard, involving less specific duties, than the health and safety regulations. Exclusive criminal enforcement, conducted by a Health and Safety Executive with a reduced budget, can only worsen the remedies for injured workers and therefore reduce the cost to employers, as well as probably leading to a general lowering of safety standards.

The second major reform was, of course, the introduction of fees for bringing claims in the employment tribunal (ET). In common with the default mechanism for enforcing workers' rights with a purely domestic origin, almost all EU-derived standards apart from health and safety are enforced exclusively by conferring an individual right of complaint to the ET. With effect from July 2013, unless an individual is entitled to 'remission' owing to her level of disposable capital and earnings, she must pay a fee before bringing a claim in an ET and a separate fee before a hearing.²⁴ The fees are very significant for claimants, especially those on low incomes, those who have just lost their jobs or those who have not been paid their wages. The revised remission scheme²⁵ has meant that far fewer individuals obtained remission than the Government predicted during the consultation which preceded fees;²⁶ one reason may be that both notice pay and redundancy payments count towards the disposable capital limit of £3,000.²⁷

When one adds in the costs of taking a tribunal claim, the low level of compensation awarded by ETs, the lamentable record of tribunal awards that are never paid (which will mean successful claimants will also not recover their fees), and the difficulties of assessing prospects of success in areas such as discrimination, a powerful deterrent effect on claimants was to be expected.²⁸ Indeed, there is a good argument that an

²³ [2013] IRLR 890 - a case concerning the criminal sanctions for breach of the Road Transport (Working Time) Regulations 2005, implementing Directive 3002/15/EC.

²⁴ See the Employment Tribunals and Employment Appeal Tribunal Fees Order 2013, SI 2013/1893.

²⁵ Now set out in a new Schedule 3 to the Fees Order.

²⁶ In 2014/15, after fees were introduced, about 20% of claimants obtained remission: see Ministry of Justice, *Tribunal and Gender Recognition Statistics Quarterly: April to June 2016*, table ETF.1 <www.gov.uk/government/uploads/system/uploads/attachment_data/file/550952/tribunal-and-gpc-stats.pdf> accessed 16 September 2016. Contrast the Government's much higher assessment in the Impact Assessment on fees, based on the *pre-fees* population of claimants: see *Introducing a Fee Charging Regime in the Employment Tribunals and the Employment Appeal Tribunal: Impact Assessment* (30 May 2012), 25-28 <consult.justice.gov.uk/digital-communications/et-fee-charging-regime-cp22-2011/results/et-fees-response-ia.pdf> accessed 16 September 2016.

²⁷ Fees Order, *ibid*, Schedule 3 para 10.

²⁸ For the latest median awards, see table E.4 in the statistics at n 26. For the evidence on enforcement, see BIS, *Payment of Tribunal Awards: 2013 Study* (IFF Research); <www.gov.uk/government/uploads/system/uploads/attachment_data/file/253558/bis-13-1270-enforcement-of-tribunal-awards.pdf> accessed 16 September 2016.

economically rational hypothetical claimant would almost never bring a claim.²⁹ In the event, actual claimants responded as predicted, contradicting the absurd assumption of the Ministry of Justice that 'ET claimants would not be highly price sensitive to fee-charging'.³⁰ Fees led to an immediate precipitous decline in the number of tribunal claims, which has been maintained consistently since, with single claims (which are more statistically reliable than the fluctuating 'multiple' claims) declining by about 67 per cent.³¹ But so far a judicial review challenge brought by the trade union UNISON, based principally on the EU principle of effectiveness and EU anti-discrimination law, has proven to be unsuccessful, though it is due to be heard by the Supreme Court at the end of March 2017.³²

While the previous Government tiptoed carefully around EU law in enacting these twin reforms, they are illustrative of an emerging trend of using changes to procedures, qualifying conditions or remedies greatly to weaken the effect of substantive rights both in employment³³ and in other areas.³⁴ They make the case for erasing existing worker rights from the statute book less pressing, even for a future Government with deregulation high on its agenda. No doubt the reforms assisted the Prime Minister in appeasing the many in the Conservative party who favour a highly deregulated labour market when she gave her assurance to the conference: rights may be 'guaranteed' post-Brexit in the statute book, but not in practice. A Janus-faced Conservative administration can announce that employment rights will be 'enhanced' as a result of the fresh review to be conducted by Matthew Taylor (which will examine how non-standard forms of employment undermine legal standards such as the minimum wage), yet at the same time fail to publish the long-awaited review which ought to address one of the major underlying causes, namely

²⁹ A. Adams and J. Prassl 'Vexatious Claims: Challenging the Case for Employment Tribunal Fees' *Modern Law Review* (forthcoming).

³⁰ *Introducing a Fee Charging Regime in the Employment Tribunals and the Employment Appeal Tribunal: Impact Assessment* (30 May 2012) para 4.12 <consult.justice.gov.uk/digital-communications/et-fee-charging-regime-cp22-2011/results/et-fees-response-ia.pdf> accessed 6 October 2016.

³¹ See the excellent analysis by D.Pyper and F.McGuinness in the House of Commons Briefing Paper, *Employment Tribunal Fees* (No. 7081, June 2016), 11; <researchbriefings.files.parliament.uk/documents/SN07081/SN07081.pdf> (accessed 16 September 2016) and the report of the House of Commons Justice Committee, *Courts and Tribunal Fees: Second Report of Session 2016-17* <www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/inquiries/parliament-2015/courts-and-tribunals-fees-and-charges/publications/> accessed 16 September 2016.

³² *R (UNISON) v Lord Chancellor* [2016] ICR 1, CA.

³³ For example, the recent increase in the qualifying period and the 12-month cap on damages for unfair dismissal (see now s.108(1) and s.124(ZA) of the Employment Rights Act 1996 (ERA)), or the two-year long stop on claims for deduction from wages in s.23(4A) ERA.

³⁴ See e.g. the recent proposal for a five-fold increase in fees for claims in the Immigration and Asylum Tribunal.

the current fees system.³⁵

Now that the long-term fate of the substantive rights has receded into the distance, probably assisted by the twin reforms I have identified, in this article I want to focus on two, narrower issues about Brexit. The first is the potential short-term consequences of Brexit for workers' rights, once the UK is no longer a Member State of the EU and the GRB is introduced as an Act. In this area, there is a reasonable amount of legal material to draw upon, though many contingencies remain. The second, less immediate, effect is the extent to which Brexit will increase the power of the UK government to maintain or intensify collateral attacks on employment rights which the recent reforms to health and safety and tribunal procedure exemplify. For I suspect this strategy, having now been widely tested and seen to 'work', will be the method of choice in the future even if it may be on hold in the medium-term.

II. POTENTIAL EARLY EFFECTS OF BREXIT

At present many significant effects of EU law, on workers' rights and beyond, flow from the Treaties themselves, and are imposed on 'Member States'. These obligations include, for instance, the principle of 'sincere co-operation' in, now, Article 4(3) TEU by which 'Member States shall take any appropriate measures, general or particular, to ensure fulfilment of the obligations arising out of the Treaties'. The consequence of the UK ceasing to be a 'Member State' is that these and similar Treaty obligations would no longer apply to it, regardless of the introduction of the GRB. These issues are far from legally straightforward, much ink will be spilt on them in the run up to Brexit taking effect, and much depends on the precise wording of the GRB. But below I highlight some of the probable and possible early casualties of Brexit.

(i) Loss of References to ECJ

The jurisdiction of the ECJ to give preliminary rulings on EU law is restricted to references from a 'court or tribunal of a Member State',³⁶ so the power of domestic courts to make references will fall away once the UK leaves the EU. The GRB will apparently confirm this inevitable legal result of Brexit itself. In the meantime, the UK courts may well be less enthusiastic to make references, even if strictly the duty to adhere to EU law will be unaffected until the UK formally withdraws from the Treaties.

It can no longer be assumed (if it ever could) that the ECJ will invariably adopt the starting point that social Directives only exist to protect workers, as exemplified by the recognition of business interests in the recent judgments in *Alemo-Herron*³⁷ and

³⁵ Fees, after all, especially affect low value claims, such as unpaid wages: see *Courts and Tribunal Fees* (n 31), 27-29 (see too the criticisms on the delay in publishing the review, 23-4).

³⁶ Article 267 TEU.

³⁷ Case C-426/11, *Alemo-Herron v Parkwood Leisure* [2013] ICR 116.

USDAW v Ethel Austin.³⁸ But still its general tendency is still to give social rights a wide meaning because they are of particular importance,³⁹ to interpret derogations from them strictly,⁴⁰ and to pay much greater attention to international treaties on labour law than the domestic courts.⁴¹

Once domestic courts replace the ECJ as the arbiters of what a social Directive means, I think the overwhelming likelihood is of a worsening of the position of workers. Though the UK courts have had many years to become acquainted with EU social law, they are not easily deflected from a tradition of giving priority to property rights and freedom of contract or from their focus on the literal meaning of legislation.⁴² As a crude summary: without the assistance of guidance from the ECJ, the UK appellate courts have hardly ever given a social Directive a wide interpretation in favour of workers.⁴³ Conversely, as I have pointed out elsewhere, there are many examples of the domestic courts confidently deciding that provisions of employment Directives had a narrow reach, only to be effectively reversed by the ECJ.⁴⁴ Working time cases provide a perfect example: without the references to the ECJ, sometimes made reluctantly or only at the highest appellate stage, the result of litigation affecting thousands of workers would have been very different.⁴⁵ Writing as a practitioner, I have little doubt that employers' lawyers on the whole would much prefer to keep matters cosy within the domestic courts rather than risk a trip to Luxembourg - perhaps as good a guide as any in an area of such broad sweep. In the

³⁸ Case C-80/14 [2015] ICR 675.

³⁹ See Ford n 3 paras 12-13 and e.g. Case C-520/06, *Stringer* [2009] ICR 1149, para 22 (working time), Case C-307/05, *Del Cerro Alonso* [2008] ICR 145, paras 27, 38 (fixed-term workers) and Case C-83/14, *CHEZ Razpredelenie* [2015] IRLR 746, para 42 (discrimination).

⁴⁰ See, among many other cases, *Del Cerro Alonso*, *ibid*, para 39.

⁴¹ See e.g. the reference to the UN Convention on the Rights of Persons with Disabilities in Case C-335/11, *Ring* [2013] ICR 851.

⁴² Though cf. how the highest courts used the existence of statutory rights, uniquely, to deny dismissed workers the ordinary remedies for a breach of contract *Johnson v Unisys* [2003] AC 1, *Edwards v Chesterfield* [2012] 2 AC 22.

⁴³ For a recent example, see the EAT in *Santos Gomes v Higher Level Care* [2016] IRLR 678, holding that claims for denials of rest breaks under the Working Time Regulations were 'analogous' to breach of contract claims (para 69), with the consequence that damages were rarely payable. Cf. *Nolan v USA* [2016] AC 463, holding that the provisions of TULRCA on collective redundancies could go further than the parent Directive.

⁴⁴ See Ford (n 3), para 12.

⁴⁵ See, for example, *Marshall's Clay v Caulfield* [2004] ICR 1502, (CA took view rolled-up holiday pay did not infringe Directive and not keen to refer), reversed by Case C-131/04 and C-257/04, *Robinson-Steele* [2006] ICR 932, ECJ; *Stringer* [2005] ICR 1149, CA (workers on sick leave not entitled to annual leave, reference only made by House of Lords), reversed by Case C-520-06, *Stringer* [2009] ECR I-179, ECJ; *Bamsey* [2004] ICR 1183, CA and *Williams* [2009] ICR 906 (CA concluded no prescribed level of pay for annual leave under Article 7, and made no reference to ECJ); reversed by the ECJ in Case C-155/10, *Williams v British Airways* [2012] ICR 847, following reference from the Supreme Court.

absence of an existing ECJ ruling directly on the point, the risk is that the domestic appellate courts return to their default position, emboldened by knowing that they can no longer be ticked off by the ECJ.

(ii) The interpretative obligation?

The interpretative obligation, by which domestic regulations must be interpreted so far as is possible to achieve the result required by EU law, is at root an obligation imposed by the Treaties on domestic courts *qua* authorities of a Member State.⁴⁶ It is not clear if this will be preserved in the GRB but at present this looks doubtful because it would be an indirect means of effectively undermining the Prime Minister's claim that 'judges interpreting [EU] laws will sit not in Luxembourg but in the courts in this country'.⁴⁷ For if post-Brexit UK judges continue to owe a duty to interpret domestic law so far as is possible in line with ECJ jurisprudence, in practical terms the ECJ will remain supreme. In the absence of an express preservation of the *Marleasing* duty or something similar in the GRB, the duty would disappear with the UK leaving the EU.

This, too, could generate detrimental effects for workers' rights. For if the domestic courts have experienced difficulties in interpreting EU Directives, they have been very vigorous in bringing domestic law into line once the ECJ has instructed them on the correct interpretation of EU law means, illustrated long ago in *Pickstone v Freemans*⁴⁸ and culminating with the current 'broad and far reaching' interpretative obligation summarised in *Vodafone 2*⁴⁹ which has now been endorsed by the Supreme Court.⁵⁰ In this they appear to have gone further than other Member States, as shown by how UK courts have dealt with the *contra legem*.⁵¹ There are many examples in the work sphere of how this obligation operated in favour of workers, such in equal pay (where domestic law is deeply entangled with EU law⁵²), discrimination and working time.⁵³

In the absence of an express legislative 'freezing' of the *Marleasing* obligation, once the UK has withdrawn from the EU the way is open for arguments that previous

⁴⁶ See e.g. Case C-106/89 *Marleasing* [1990] ECR I-4135, para 8, and the Grand Chamber in Case C-397-403/01, *Pfeiffer*, at paras 110-114, referring among others to former Article 10, now Article 4(3) TEU.

⁴⁷ Theresa May's speech to Conservative party conference, n 1.

⁴⁸ [1989] AC 66.

⁴⁹ *Vodafone 2 v Revenue and Customs* [2010] Ch 77 per Sir Andrew Morritt VC, paras 37-38.

⁵⁰ *Robertson v Swift* [2014] 1 WLR 3428, paras 20-21.

⁵¹ See *Lock v British Gas* [2016] EWCA Civ 803 per Sir Colin Rimer at paras 102-103; contrast e.g. the approach of the Danish Court discussed in Case C-441/14, *Dansk v Rasmussen* [2016] IRLR 552, discussed in *Lock*.

⁵² For a useful summary, see Mummery LJ in *Redcar and Cleveland BC v Bainbridge* [2009] ICR 133, paras 30-60.

⁵³ See my advice for the TUC (n 3), para18 for some examples.

decisions of the domestic courts, based on that obligation, should no longer be binding in their application to post-Brexit events. There will remain a counter-argument of purely domestic interpretation, that Parliament ‘intended’ to give effect to the relevant provisions of EU law. But this approach is mostly restricted to implementing legislation and is much less aggressive than the interpretative obligation. It would not permit, for example, significant departures from the literal wording, let alone the rewriting of domestic provisions. The recent ruling in *Lock v British Gas*, reinterpreting the Working Time Regulations 1998 to ensure commission was included in holiday pay in accordance with the parent Directive, is a good example: the Court of Appeal was explicit that domestic techniques alone could not achieve that result.⁵⁴ The result will be a messy period post-Brexit, when many points established in favour of workers after long battles through the appeal system will be vulnerable to being challenged anew.

(iii) Direct Effect?

The doctrine of direct effect gives vertical effect to sufficiently precise provisions of Directives, and horizontal effect to some Articles of the TFEU, such as Article 157 on equal pay, and to general principles of EU law, such as the right not to be discriminated against.⁵⁵ It too is derived from the obligation of a Member State under the Treaties, independent of domestic law, so that Brexit should put an end to it independent of domestic legislation.⁵⁶ It is not clear if this doctrine will be preserved as part of the *acquis* which Mrs May said would be preserved in the GRB. On the one hand, its preservation would tend to undermine her notion that post-Brexit the UK would be a ‘fully independent, sovereign country’,⁵⁷ especially if the legislation preserved the direct effect of (some?) Treaty articles or the EU Charter. On the other, it may be necessary to preserve at least EU regulations which have direct effect by virtue of Article 288 TFEU (though these are of limited relevance to employment law). Once more, the drafters of the GRB will have some difficult legal rocks to navigate around.

Assuming the doctrine disappears on Brexit and is not retained in the GRB (at least in relation to Directives or Articles of the Treaties), its loss would operate ambiguously for workers. Owing to the expansive approach the courts have taken to the interpretative obligation, it has had less territory to occupy. Still, in areas such as equal pay and working time it has often circumvented any problems of interpretation and ensured workers were granted a remedy,⁵⁸ and it will become

⁵⁴ *Lock* n 51 per Sir Colin Rimer at para 49.

⁵⁵ See most recently Case C-441/14, *Dansk v Rasmussen* [2016] IRLR 552, paras 21-27.

⁵⁶ The same should apply to the linked obligation on a Member State to pay compensation for its failure to implement EU law, following.

⁵⁷ Theresa May, speech at n 1.

⁵⁸ In equal pay cases, for example, it is common to plead Article 157 in the alternative, to ensure no issues of interpretation arise. For an application in working time, where the court was able

more important if the interpretative obligation withers in time.

On the other hand, direct effect of economic freedoms in the Treaties, such as freedom of establishment in, now, Article 49 TFEU and freedom to provide services in Article 56 TFEU have been the source of powerful curbs on collective action. Foremost among the ECJ decisions is *Viking*, where the Court held that Article 49 had horizontal direct effect, so enabling a private company to obtain an injunction and unlimited damages against a striking union.⁵⁹ In the same vein, in *Laval* Article 56 precluded strike action aimed at ensuring posted workers received collectively-bargained rates of pay.⁶⁰ While domestic law places a bewildering array of procedural and substantive restrictions on strikes, which will be significantly increased once the Trade Union Act 2016 comes into force, it does not independently incorporate the provisions of the Treaties, and it still retains a cap on damages.⁶¹ In an environment where the legal costs alone for interim injunctions often run into hundreds of thousands of pounds, the threat of potentially unlimited damages on top has had serious ‘chilling’ effect on some industrial action, as Tonia Novitz and Phil Syrpis have noted.⁶²

(iv) Francovich and Infringement Proceedings?

Direct effect is one means for closing the gap which opens up where domestic law cannot be interpreted in accordance with EU law, which can only expand if the *Marleasing* duty weakens. The other EU mechanisms for penalising a Member State whose laws do not correspond with EU law will also disappear with Brexit. It will put paid to the *Francovich* action for damages against the UK where it has failed properly to implement EU law, because that duty is equally a creature of Article 4(3) of the TEU, and it is pretty much unimaginable that the UK would give effect to this duty via the GRB.⁶³ Infringement proceedings by the Commission under Article 258 TFEU will also cease, and the Commission will probably discontinue any existing infringement proceedings against the UK, given that the UK Government could simply ignore any judgment of the ECJ against it. Infringement actions in the past had a significant role in ensuring UK employment law was brought into line with EU Directives,⁶⁴ and they remain a useful means of a complaint about non-compliance

to interpret the domestic legislation as well, see *NHS Leeds v Larner* [2012] ICR 1389.

⁵⁹ Case C-438/05 *ITWF v Viking Line ABP* [2007] ECR I-1077, and see P.Syrpis and T.Novitz, ‘Economic and Social Rights in Conflict: Political and Judicial Approaches to their Reconciliation’ (2008) 33(3) *European Law Review* 411.

⁶⁰ Case C-341/05 [2008] IRLR 160.

⁶¹ Trade Union and Labour Relations (Consolidation) Act 1992, s.22.

⁶² T. Novitz and P. Syrpis ‘The United Kingdom’ in M. Freeland and J. Prassl (eds), *Viking, Laval and Beyond* (Hart 2014)

⁶³ Case C-6 and 9/90 *Francovich* [1995] ICR 722.

⁶⁴ See e.g. *Commission v UK* [1994] ICR 578 (equal value claims) and *Commission v UK* [1994] ICR 664 (consultation where no recognised unions).

outside of individual litigation, especially for bodies such as NGOs.⁶⁵

III. FUTURE EU SOCIAL LAW

The most obvious certain casualty of Brexit will be future social rights adopted by the EU after the UK has withdrawn from the Treaties: not even Ms May's guarantee is likely to have dynamic effect and embrace EU law as enacted from time to time. Here too the long-term trajectory of the EU is not easy to predict, as social Europe has waxed and waned over the years. Little social law has been introduced since the Lisbon strategy was agreed in 2000,⁶⁶ and following the financial crisis EU policies in the name of austerity and competitiveness have increasingly driven deregulation of labour protections at national level, with sectoral collective bargaining a particular target.⁶⁷

In this context it is unsurprising that the current agenda for additional social rights by means of 'hard' law is restrained. The Commission's current work programme is aimed at modernising and recasting existing law rather than introducing significant new Directives.⁶⁸ There is a consultation on introducing legislation to improve flexible work arrangements for parents and carers.⁶⁹ The proposal to amend the Posted Workers Directive (predictably resisted by the former Eastern bloc countries), to ensure posted workers receive not just the legal minimum wage but also rates of pay in 'collective agreements which have been declared universally applicable', marks a step towards cutting the particular legal Gordian knot in this area. But it is not relevant to the UK system of collective bargaining.⁷⁰ The Commission's proposal for a 'European Pillar of Social Rights' envisages, among other matters, new minimum standards on fair remuneration and adequate compensation for dismissal of workers.⁷¹ The modesty of this initiative has been criticised by Bogg and Ewing,⁷²

⁶⁵ The TUC, for example, recently complained to the Commission about the UK's implementation of the Temporary Agency Work Directive - see <www.tuc.org.uk/workplace-issues/employment-rights/proposed-changes-law/basic-rights-work/tuc-lodges-complaint> accessed 5 October 2016.

⁶⁶ C. Barnard, *EU Employment Law*, chapter 3 (Oxford University Press, 2012)

⁶⁷ See e.g. K. Ewing, 'The Death of Social Europe' (2015) 26 *King's Law Journal* 76

⁶⁸ See the *Commission Work Programme 2016* COM(2015) 610 final at <ec.europa.eu/atwork/pdf/cwp_2016_en.pdf> (accessed 24 August 2016) and the *List of Planned Commission Initiatives* (2016) at <ec.europa.eu/atwork/pdf/planned_commission_initiatives_2016.pdf> accessed 5 October 2016.

⁶⁹ *Commission Consultation Document C*(2016) 2472 final (12 July 2016) <ec.europa.eu/justice/gender-equality/economic-independence/economic-growth/index_en.htm> accessed 5 October 2016.

⁷⁰ *Commission Proposal* COM(2016)128 final <ec.europa.eu/social/main.jsp?catId=471> accessed 5 October 2016.

⁷¹ See the Commission, *Launching a Consultation on a European Pillar of Social Rights* COM(2016) 127 final, at para. 3 (available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1457706909489&uri=COM:2016:127:FIN>; accessed 5 October 2016). For discussion, see K. Lörcher and I. Schömann, *The European Pillar of Social Rights: Critical Legal Analysis*

but even if enacted it would not apply to the UK by virtue of its membership of the EU because it 'will be developed within the euro area, while allowing other EU Member States to join in if they want to do so'.⁷³ We await to see if these last two proposals are enacted, are the beginnings of a shift towards a revitalised social agenda or the embers of a dying one, or are joined by others by the time of Brexit.

4. EU LAW RESTRICTING COLLATERAL ATTACKS ON RIGHTS

The last issue I wish to explore is the extent to which Brexit will open up more space for pursuing the current fashion for collateral attacks on substantive worker rights. EU law has developed a range of principles controlling the means by which Member States give proper effect to EU law. At an early stage the ECJ in *Rewe* interpreted the duty of cooperation in, now, Article 4 TEU as entailing that national procedural rules must not render it impossible in practice to exercise EU rights, and nor must they be less favourable than the rules protecting similar claims under national law.⁷⁴ The ECJ has evolved the law considerably since, relaxing the principle of effectiveness to a standard that procedures must not make it 'excessively difficult' to exercise EU rights, and developing a general obligation on Member States to ensure the effective judicial protection of EU rights.⁷⁵ Drawing on the Treaties,⁷⁶ in *Von Colson* the ECJ ruled that sanctions must 'guarantee real and effective judicial protection', so that where civil compensation is the means chosen by a Member State for protecting EU rights it must fully cover the loss and damage sustained and have a real deterrent effect.⁷⁷ This led, of course, to removal of the caps which at the time were features of UK anti-discrimination law.⁷⁸

These principles are now reinforced by additional provisions: Article 19 of the TEU requires Member States to provide 'remedies sufficient to ensure judicial protection' in the areas covered by EU law; Article 47 of the Charter of Fundamental Rights of the EU gives 'everyone the right to an effective remedy before a tribunal' if their EU-guaranteed rights are infringed; and some Directives, such as those in

and Proposals (European Trade Union Institute, 2016)

⁷² A. Bogg and K.Ewing, 'The Continuing Evolution of European Labour Law and the Changing Context for Trade Union Organising' (2017) 38(2) *Comparative Labor Law and Policy Journal* (forthcoming).

⁷³ *Consultation on a European Pillar of Social Rights*, n 70, 7.

⁷⁴ Case C-33/76 *Rewe* [1976] ECR 1989 at paras 5-6

⁷⁵ See especially Case C-432/05, *Unibet* [2007] ECR I-2771 at paras 37-42, Case C-C268/06, *Impact* [2008] ECR I-2438, paras 37-47 and S. Prechal and R. Widdershoven, 'Redefining the Relationship Between "Rewe-effectiveness" and Effective Judicial Protection' (2011) 42 *Review of European Administrative Law* 31.

⁷⁶ In, now, respectively Article 4 TEU and Article 288 of the Treaty on the Functioning of the EU.

⁷⁷ Case C-14/83, *Von Colson* [1984] ECR 1891 paras 22-24

⁷⁸ See the original s.65 Sex Discrimination Act 1975, s.56 Race Relations Act 1976 and s.2 of the Equal Pay Act 1970.

discrimination, now expressly articulate the *Von Colson* principle on remedies.⁷⁹ EU law has also prevented the use of qualifying periods for workers' rights or the attempt to carve out exemptions for small businesses, demonstrated by the ECJ ruling in *BECTU*.⁸⁰ Finally, EU law supplements the duties on public bodies in s.29 and s.149 of the Equality Act 2010 and challenges to potentially discriminatory domestic legislation via judicial review, including by equality bodies.⁸¹

One consequence of these EU principles has been to limit recent government's collateral attacks on workers' rights. For example, when the last Government moved quickly to limit employers' potential liability for holiday pay claims under the Working Time Regulations in the wake of the EAT judgment in *Fulton v Bear Scotland*,⁸² it had to ensure that the temporal limit applied to other types of claims for past wages, for fear of breaching the EU principle of equivalence.⁸³ That the result was to penalise deserving claimants such as those who had not been paid the national minimum wage - just the sort of issue the forthcoming review is meant to address - was an unfortunate but necessary side effect of a policy designed to protect businesses. It is clear, too, that the last Government was committed to 'reviewing' uncapped damages for discrimination but was stopped in its tracks by the *Von Colson* principle, as the Government acknowledged at the time.⁸⁴ EU law was probably influential, too, in the decision to drop the original 'Option 2' to use tribunal fees to cap compensation awards, following objections in the consultation that this was incompatible with EU law.⁸⁵

We should not overlook the Limitations of EU law in this area, highlighted by the Court of Appeal judgments in *UNISON* and *URTU*.⁸⁶ The outcome in *UNISON* leads

⁷⁹ See e.g. Article 25 of Directive 2006/54 and the discussion of its history in the opinion of Advocate General Mengozzi in Case C-407/14, *Arjona Camacho* [2016] ICR 389.

⁸⁰ See the original regulation 13 to the Working Time Regulations 1998 and Case C-173/99, *BECTU* [2001] ECR I-4881, where the ECJ rejected an argument from the UK government that it could impose restrictions on holiday entitlement in the interests of small businesses (at paras 57-61).

⁸¹ See e.g. *R v Secretary of State for Employment ex parte EOC* [1995] 1 AC 1

⁸² [2015] ICR 221.

⁸³ See s.23(4A)-(4B) of ERA, introduced by SI 2014/332

⁸⁴ BIS, *Employment Law Review: Annual Update* (2012), 15-16, <www.gov.uk/government/uploads/system/uploads/attachment_data/file/49015/12-p136-employment-law-review-2012.pdf> accessed 16 September 2016.

⁸⁵ See Ministry of Justice, *Charging Fees in the Employment Tribunal and the Employment Appeal Tribunal* (14 December 2011) and, *Charging Fees in the Employment Tribunal and the Employment Appeal Tribunal: Response to Consultation* (13 July 2012), both at <consult.justice.gov.uk/digital-communications/et-fee-charging-regime-cp22-2011> accessed 6 October 2016.

⁸⁶ See n 23 and n 32 respectively. Note too criticisms of the EU's own failure to respect international legal obligations on collective bargaining and striking: K. Ewing and J. Hendy 'The Eclipse of the Rule of Law: Trade Union Rights and the EU' (2015) 4 *Revista Derecho Social y Empresa* 80.

Bogg and Ewing to criticize ‘the failure of EU law to provide solutions to what is historically one of the most severe challenges to the Rule of Law in relation to workers’ rights’.⁸⁷ A partial response is that both claims largely turned on the evidence before the courts leaving open the possibility that other evidence would lead to a different result. In *URTU*, for instance, there was a specific finding on the effectiveness of the enforcement regime,⁸⁸ and in *UNISON* the Court of Appeal was clear that if the review of fees showed that claimants could not realistically afford to pay fees ‘the level of fees and/or the remission criteria will need to be revisited’.⁸⁹ It remains to be seen if the Supreme Court in *UNISON* will take a different view of the evidence or conclude that the Court of Appeal adopted too narrow a review standard in deciding that the relevant criterion for the purpose of Article 6 ECHR and the EU principle of effectiveness was solely whether claimants could reasonably afford to pay a fee, as Adams and Prassl argue.⁹⁰

More fundamentally, the powerful criticism of Bogg and Ewing depends on how much you rely on EU law to ensure adherence to the UK’s own legal standards. The EU principles are, as always, only minimum standards because the ECJ has had to walk a tightrope between enforcing uniform EU-wide standards and preserving the procedural autonomy of Member States.⁹¹ Nothing prevents a Member State e.g. combining civil sanctions with criminal penalties, as used to be the case with health and safety regulations in the UK. Moreover, the requirements for effective individual and systemic enforcement of labour rights extend far beyond any simple model of top-down legal rules, since they turn upon factors such as knowledge of rights, access to legal advice, capacity to bring claims, the type of enforcement mechanism and so on, as a large literature attests.⁹² You can’t expect the high level norms of EU law to fill this gap: it needs state action on the ground and other forms of support mechanisms for workers.

But in so far as the overarching legal norms are part of the solution, post-Brexit the EU principles will be replaced by the common law and, at least pending a UK Bill of Rights, Article 6 of the European Convention on Human Rights (ECHR). These sources add nothing to EU law and in several respects provide significantly weaker protection. First, Article 47 of the EU Charter already guarantees at least the same level of protection as Article 6 ECHR, with the additional supplement that it cannot

⁸⁷ See n 72.

⁸⁸ *URTU* para 33, citing the finding of Hickinbottom J. at para 84(vii) in the High Court.

⁸⁹ Underhill LJ, n 32, para 76.

⁹⁰ See n 29 and *UNISON* n 32 per Underhill LJ at para 41.

⁹¹ For the history, see A. Dashwood, M. Dougan, B. Rodger, E. Spaventa and D. Wyatt, *Wyatt and Dashwood’s European Law* (Hart 2011), 289-302

⁹² An issue on which Linda Dickens, in particular, has been vigilant. See e.g. L. Dickens (ed), *Making Employment Rights Effective* (Hart 2012).

be overridden by primary legislation.⁹³ Second, there is no analogue in Article 6 ECHR or the common law to the requirement of effective remedies derived from *Von Colson*, including uncapped civil compensation.⁹⁴ Third, the principle of equivalence is unique to EU law. Fourth, EU law goes considerably further than Article 6 in the means it recognises as necessary to protect rights. In *Coote*, for instance, the ECJ held that anti-discrimination law would lose an ‘essential part of its effectiveness’ if it did not protect workers against post-employment victimisation, given the aim was ‘to arrive at real equality of opportunity’.⁹⁵ Similarly, in *Impact* the Grand Chamber went so far as to indicate that the need to bring proceedings in the ordinary courts instead of specialist labour tribunals would infringe the principle of effective judicial protection if it resulted in procedural disadvantages, such as costs, which made it excessively difficult to bring the claims.⁹⁶ The same principle also prevented the Irish government, in its capacity as employer, from taking action to frustrate the objectives of the Directive before it came into force.⁹⁷ None of these protections is likely to figure in Article 6 ECHR, and the common law is considerably more feeble in its protection of access to courts and effective remedies.⁹⁸

The heightened level of protection under EU law arises, I suggest, because it embodies a dual requirement: both the individual’s right of access to a court *and* the need for Member States to ensure adequate protection of EU rights at the *systemic* level (so contributing to the uniformity of EU standards across Member States).⁹⁹ The twin standards have different sources, though they often chime together, with the second element principally based on the duties of a Member State, including its courts, to ensure EU law is fully effective.¹⁰⁰ But this second element is pretty much absent from both the common law and Article 6 ECHR, owing to their focus on the individual’s right of access to the courts. In principle, the EU standard should enable national courts to take account of a wider range of factors, not restricted to whether an actual individual could realistically cross the threshold into the court room, such

⁹³ Case C-279/09, *DEB Deutsche Energiehandels* [2011] 2 CMLR 21, ECJ and *Benkharbouche v Embassy of Republic of Sudan* [2016] QB 341, CA.

⁹⁴ The effective remedy provisions in Article 13 ECHR are restricted to violations of the rights in the Convention itself, and in any case have not generated a requirement of compensation for full financial loss.

⁹⁵ Case C-185/97 [1999] ICR 100 paras 23-27.

⁹⁶ *Impact*, n 74, especially paras 51-55.

⁹⁷ *Impact*, n 74, paras 83-92.

⁹⁸ See e.g. the absence of any right to legal aid at all at common law: see *R v Lord Chancellor ex p. Witham* [1998] QB 575. For discussion of the weakness of the common law compared to Article 6, see P. Bowen QC, ‘Does the Renaissance of Common Law Rights Mean that the Human Rights Act 1998 is now Unnecessary?’ [2016] 4 *European Human Rights Law Review* 361 (and cf. *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591 per Lord Reed at paras 118-119).

⁹⁹ For discussion of the ‘adequacy’ test, see W. Van Gerven ‘Of Rights, Remedies and Procedures’ (2000) 37 *Common Market Law Review* 501.

¹⁰⁰ See e.g. *Impact* n 74 at paras 40-43, drawing on, now, Article 288 TFEU and Article 4 TEU.

as whether national measures ‘might deter’ individuals in general from bringing claims and so interfere with real, effective realisation of legal standards.¹⁰¹

Whatever the limitations of EU law – and *UNISON* and *URTU* expose these all too clearly – post-Brexit the door is wide open for an expanded use of collateral attacks on workers’ rights, with many more potential weapons to draw upon and much weaker constraints on action. The Government’s hand on tribunal fees will be strengthened, and it will be free to introduce other procedural restrictions, exemptions for small businesses, qualifying periods or limitations on remedies pretty much as it wishes. In a post-Brexit world no action could have been brought in *URTU* at all. Save where legislation interferes with the individualised notion of ‘access to justice’ in Article 6, collateral attacks will be largely immune from challenge, and in all cases primary legislation would be a trump card. Whether the Prime Minister’s personal ‘guarantee’ to protect existing workers’ rights extends to limiting the use of such collateral attacks during her premiership is unclear, but no-one is taking bets on the pending reviews of Matthew Taylor or the Ministry of Justice leading to radical steps to reduce the effect of fees. The long-term future post-Brexit may increasingly be rights without remedies, a logic which has recently been pushed to its end point.¹⁰²

IV CONCLUSION

Despite the recent assurance of the Prime Minister, Brexit continues to pose serious threats to workers’ rights and the means of giving effect to them. In the short(ish) term, the loss of references to the ECJ, coupled with other probable effects such as the loss of infringement proceedings, are likely to cause some regression in standards. The potential damage to workers’ rights will be significantly increased if the interpretative obligation, or something similar, is not retained by means of the GRB, opening space for arguments that existing judgments on the interpretation of domestic law should be revisited. If direct effect of Treaty Articles and Directives is not preserved via the GRB, this loss will be more ambiguous to workers and unions, causing some harm to individual rights but improving unions’ capacity to take collective action. The long-term is much harder to predict, of course, but at present, there are few instruments of new EU social law on the horizon which would significantly affect employment law if the UK remained a member of the EU.

The more serious long-term effect, I suspect, will be the loss of the constraints imposed by EU law on the means of giving effect to workers’ rights. Governments in advanced capitalist democracies are under pressure simultaneously to promote free

¹⁰¹ *Coote* (n 95) para 24; cf. the CA in *UNISON* n 32.

¹⁰² The draft Equality Act 2010 (Gender Pay Gap Information) Regulations 2010 provide no remedy at all for breach: see www.gov.uk/government/uploads/system/uploads/attachment_data/file/504398/GPG_consultation_v8.pdf accessed 29 September 2016.

markets and to satisfy calls from citizens for social entitlements,¹⁰³ and labour market policy is a paradigmatic site where this central conflict is expressed. One superficial means of its resolution is to grant workers entitlements in law while allowing regulatory liberalism to triumph in fact. Recent reforms show how this can be achieved: either the enforcement of general labour standards is privatised - responsibility is given solely to individuals not the state - but then is so encumbered with financial and other restrictions that few individuals can in practice obtain an adequate remedy (civil claims in ETs); or enforcement is made the exclusive responsibility of state agencies which possess a wide discretion to take action or lack the necessary resources to make enforcement effective (health and safety duties). The adoption of criminal law enforcement for some of the worst kinds of labour market abuse is no more than a token gesture the other way,¹⁰⁴ irrelevant to most workers most of the time, and itself critically dependent on well-resourced enforcement agencies. The drift towards symbolic rights has strengthened in recent years; once free from EU law, a future government will be have greater power to maintain, multiply and intensify collateral attacks on workers' rights.

Weber's immanent critique of formal freedom of contract was based on the extent to which unequal distributions of property and economic power in practice facilitated an increase in authoritarian coercion of workers within the capitalist enterprise.¹⁰⁵ It remains valid today, but it has been partially corrected by legislative interventions. Collateral attacks on those market-correcting rights highlight a second immanent critique: the failure of the legal system in fact to deliver the substantive rights which it promises. EU law is not and never was a complete answer to such an intractable problem, which depends on many factors far beyond how rights are recognised and enforced within the legal system; but, for all its limitations, it is a fuller legal expression of those immanent norms than what will replace it.

¹⁰³ W. Streeck, 'The Crisis in Context: Democratic Capitalism and Its Contradictions' in A. Schäfer and W. Streeck (eds), *Politics in the Age of Austerity* (Polity 2013).

¹⁰⁴ See the Modern Slavery Act 2015 and Part 1 of the Immigration Act 2016, with the powers of the Director of Labour Market Enforcement and the Gangmasters and Labour Abuse Authority.

¹⁰⁵ M. Weber, *Economy and Society* (University of California Press 1978) 730-1